United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

Brief for Appellant

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

668

No. 19,914

RAYMOND W. EPPERSON,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Forma Pauperis Appeal from a Judgment of the

United States District Court for the District of Columbia.

BAKER, McKENZIE & HIGHTOWER
WALTER A. SLOWINSKI
J. P. JANETATOS
Counsel for Appellant
(Appointed by this Court)

815 Connecticut Avenue, N.W.
Washington, D. C.
(298-8290)

QUESTIONS PRESENTED

1. Whether the delay caused by the Government's arbitrary revocation of its choice of charging a misdemeanor, and the later prosecution of a felony charge, substantially prejudiced the rights of Appellant.

2. Whether the denial of a request for a pre-trial mental examination was an abuse of discretion which substantially prejudiced the rights of Appellant.

INDEX

TABLE OF AUTHORITIES

Cases*

Constitutional Provisions, Statutes and Rules Involved

* Cases chiefly relied upon are marked by asterisks.

Brief for Appellant

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,914

RAYMOND W. EPPERSON,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Forma Pauperis Appeal From a Judgment of the United States District Court for the District of Columbia.

JURISDICTIONAL STATEMENT

An indictment was filed on July 29, 1964, charging Defendant Epperson with a violation of 22 D.C. Code § 3204 (Carrying a Dangerous Weapon).

Defendant pleaded not guilty and on November 29, 1965, was tried before Judge Keech and a jury and was found guilty. On December 17, 1965, Defendant was sentenced to fifteen to forty-five months incarceration.

On January 3, 1966, Defendant was authorized to proceed on appeal without prepayment of costs by Judge Keech. Preparation of a transcript at Government expense was authorized in the same order. The Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE CASE

This is an appeal by Raymond W. Epperson from a judgment and sentence upon a jury verdict of Guilty on one count of carrying a dangerous weapon.

Chronology

Defendant Epperson was arrested in front of 825 - 14th Street, Northwest, in the City of Washington, District of Columbia, in the early morning hours of April 24, 1964, by a detective sergeant of the Metropolitan Police Department, one Teddy Thanos. On that same date he was charged in the District of Columbia Court of General Sessions with the misdemeanor of carrying a dangerous weapon. Defendant was released on $500 bond. On May 19, 1964, a request for a jury trial was granted and Defendant's $500 bond was continued. June 17, 1964, was set as the date of the trial.

On June 17, 1964, the misdemeanor charge was nolle prossed and Defendant was charged with the felony of carrying a dangerous weapon. Bail was set at $2,000 and Defendant was confined in the District of Columbia Jail.

On June 29, 1964, the Grand Jury indicted Defendant for carrying openly and concealed on or about his person, a dangerous weapon, a pistol, without a

license in violation of Title 22, section 3204 of the District of Columbia Code.

On August 27, 1964, Defendant was released from custody having posted bond in the amount of $2,000. On October 2, 1964, Defendant was arrested in Baltimore, Maryland, on an unrelated charge. On November 5, his bond was forfeited. On November 12, 1964, the forfeiture was set aside and on June 2, 1965, Defendant was acquitted of all charges in Baltimore.

On July 2, 1965, Defendant was returned to custody in the District of Columbia and bail was set at $10,000.

Defendant made a motion to dismiss the indictment on September 21, 1965, which motion was denied. On November 9, 1965, Defendant made a motion to suppress evidence which was secured as the result of an unlawful arrest. That motion was denied. Defendant then moved on November 19, 1965, for a pre-trial mental examination to determine his competency to stand trial and to determine also whether, at the time of the offense, he had any abnormal mental condition of which the offense may have been a product. Such motion was denied on the day it was filed without a hearing.

The case was then set for trial and after several continuances requested by Defendant for the

purpose of securing a witness, trial was held on November 29, 1965.

On the morning of the trial, Defendant moved both before the trial Judge and the Chief Judge that he be granted a continuance. Both motions were denied.

The Defendant was tried before a jury and found guilty as charged in the indictment. On December 17, 1965, Defendant was sentenced to imprisonment for a period of fifteen to forty-five months.

The Testimony At The Trial

Summary

Detective Sergeant Teddy Thanos of the Metropolitan Police Department testified that he arrested Defendant on April 24, 1964, when he observed him standing on the street with a gun-butt revealed. (Tr. 4, 5) Stipulated testimony by Howard D. Covell, Deputy Chief of Police, Metropolitan Police Department, was that the police records showed that Defendant had no license to carry a pistol. (Tr. 12-13)

One Kip Smith authenticated a hospital record of Defendant showing that he had been discharged from Prince Georges General Hospital on April 14, 1964. (Tr. 14-15)

Dr. Won Ju Hahn testified that Defendant was treated in Prince Georges General Hospital from March 24,

1964, to April 14, 1964, for a heart attack. (Tr. 19) The doctor further testified that Defendant was, upon discharge, given a prescription, and also testified as to the probable effect of such prescription taken in the dosage and circumstances existing at the time. (Tr. 21-22, 41-43, 47-48)

Defendant testified as to the reasons for his presence in the area, and denied knowledge of the presence of the pistol upon his person at the time of his arrest. (Tr. 27-29, 32) Defendant further testified as to the dosage of the aforementioned prescription which he had taken, the circumstances under which the prescription was taken, and its effect upon him. (Tr. 30-32, 37) Defendant also testified that he knew who placed the pistol upon his person. (Tr. 35) Finally, Defendant testified as to prior convictions. (Tr. 39-40)

Detective Sergeant Teddy Thanos

Detective Sergeant Thanos testified as follows: Detective Sergeant Thanos identified the Defendant. (Tr. 4) He testified that on the early morning of April 24, 1964, he was having breakfast at the Californian Steak House, located in the 800 block of 14th Street, Northwest. (Tr. 4-5)

After having breakfast, while walking up the street, he observed the Defendant standing in front of

825 - 14th Street, Northwest, with the butt of a pistol revealed from his belt. (Tr. 5, 6)

Detective Sergeant Thanos then placed Defendant under arrest for carrying a dangerous weapon. (Tr. 6) Defendant "avoided answering direct questions . . . put to him" by Detective Sergeant Thanos, particularly with reference to questions concerning Defendant's reason for being in possession of the pistol. (Tr. 6, 9) Detective Sergeant Thanos testified that Defendant did not appear to be intoxicated or sick. (Tr. 6-7, 9-10) Further testimony of Dectective Sergeant Thanos indicated that four live rounds of ammunition were in the pistol, and one spent shell. (Tr. 7) Detective Sergeant Thanos stated that Defendant had told him that he had been in a fight the night of the 23rd or early in the morning of the 24th. (Tr. 7)

Detective Sergeant Thanos marked the pistol with a pencil after recovering it from the Defendant, (Tr. 5, 8) which he identified as the pistol taken from Defendant. (Tr. 5)

On cross-examination Detective Sergeant Thanos' testimony was substantially the same as it had been on direct. He testified that there was an odor of alcohol upon the breath of Defendant. (Tr. 9) He learned that

Defendant had been sent to the hospital when he returned to the station house, (Tr. 7, 10) but that he did not know until Defendant told him that Defendant had a heart condition. (Tr. 10) Defendant was returned to the jail after examination. (Tr. 10) Detective Sergeant Thanos also stated that the gun was not registered with the Metropolitan Police Department. (Tr. 11) Finally, Detective Sergeant Thanos testified that he did not know whether the pistol was functional, as he was not allowed to test it. (Tr. 12)

The pistol identified by Detective Sergeant Thanos was admitted into evidence as Government's Exhibit 1. (Tr. 8) Government's Exhibits 2 and 3, the statements of Detective Sergeant Thanos, were also marked for identification. (Tr. 12)

Deputy Chief Covell

It was stipulated that Deputy Chief Covell was Deputy Chief of Police of the Metropolitan Police Department of the District of Columbia, (Tr. 12) and that if he were called he would testify that no license had been issued to the Defendant authorizing his possession of a pistol as of April 24, 1964. (Tr. 12-13)

Kip Smith

On direct examination Mrs. Kip Smith testified

that she was a clerk at the Prince Georges General Hospital, and that she had brought with her the medical record of Defendant. (Tr. 14) These records were marked for identification as Defendant's Exhibit 1, over objection of Government's counsel. (Tr. 14, 15) After a Bench Conference, the witness was excused, (Tr. 17) and the records were received into evidence. (Tr. 17)

Won Ju Hahn

Won Ju Hahn testified that she was a doctor of medicine, and was stationed at Prince Georges General Hospital in April of 1964. (Tr. 18) Dr. Hahn identified Defendant's medical record and Defendant. (Tr. 18, 19) Dr. Hahn testified that Defendant was admitted to Prince Georges General Hospital on March 14, 1964, for a heart attack, (Tr. 19) that she was the resident physician working under Defendant's attending doctor, (Tr. 20) that during Defendant's treatment the drugs peritrate with phenobarbital, equanil and coumadin were administered to Defendant, (Tr. 20-21) that upon his discharge Defendant was given a prescription for the drugs mentioned (Tr. 21-22) and that phenobarbital is a sedative. (Tr. 23) Testimony was further given that Defendant did not return to the clinic in one week, although he was instructed to so report.

(Tr. 22) Subsequent to the testimony of Defendant, Dr. Hahn further testified that if Defendant took over ten of the phenobarbital pills it would make him extremely drowsy, (Tr. 42) and that the effect of a drink of whiskey would be to hasten this response. (Tr. 43)

On cross-examination Dr. Hahan testified that the amount of the phenobarbital prescription given Defendant upon his discharge was twenty-eight tablets, (Tr. 43) to be taken three or four times a day. (Tr. 44) Dr. Hahan also testified that if Defendant had taken the pills in accordance with the prescribed dosage he would have none left on April 24, 1964, (Tr. 44) but that she did not know whether or not he had taken them in the prescribed manner, (Tr. 44) and that this type of medicine would require a prescription. (Tr. 44-45) Dr. Hahn also testified that she had had occasion to treat a person who had taken ten or twelve such tablets within an hour, (Tr. 46, 47) that since such a patient "has other serious complications" the stomach is pumped out "because we like to be on the safe side." (Tr. 47) Dr. Hahn stated that such a dosage, while possibly causing a person to become very sedate, would not cause a loss of consciousness. (Tr. 48)

Raymond Walton Epperson

Defendant Epperson testified that late on the evening of April 23, 1964, he was called by the maid of

Miss Sharon Sweeney, a performer at the Red Slipper night club, who told Defendant that Miss Sweeney wanted to see him. (Tr. 26-27) He did not know what she wanted, nor was he aware of the precise time he arrived at the club. (Tr. 27-29) Defendant testified that he did not have a pistol upon his person when he went into the club. (Tr. 32) Defendant was informed by the bartender that Miss Sweeney was in the dressing room, (Tr. 29) and Defendant had a drink after taking "at least" ten or twelve of the prescribed tablets, (Tr. 29-32) as he was having chest pains. Defendant then ordered a second drink, but as he felt dizzy he asked the bartender to move the drink to a table. (Tr. 30) Defendant thinks that he went to sleep at this point, as he does not remember consuming the second drink he had ordered, and testified that the next thing that he remembered was being pushed from the foyer of the club into the street, at which time he was arrested. (Tr. 30-33) He did not become aware that he had been in possession of the pistol in question until after he returned from the hospital, to which he had been sent after being taken to the station house. (Tr. 33-34) Defendant testified that he told Detective Sergeant Thanos, on being informed of the reason for his arrest, that someone must have put the pistol in

his belt. (Tr. 35) Defendant testified that he knew that Miss Sweeney had done so, (Tr. 35) and the reasons for which she had done so. (Tr. 35) Miss Sweeney died in the first part of June, 1964. (Tr. 36)

On cross-examination Defendant testified that he was not aware that Miss Sweeney had put the pistol in his belt at the time of such occurrence, (Tr. 36-37) and repeated his testimony in regard to taking the prescription. (Tr. 37-38) Defendant further testified that he did not know the whereabouts of the maid who had called him. (Tr. 37) He then acknowledged his convictions for prior criminal charges; in 1929 for entering a house to commit a felony; for burglary and first degree murder; for kidnapping, which conviction was later reversed and dismissed; for assault with intent to rob and shooting to kill; for robbery with a deadly weapon; and for carrying a dangerous weapon. (Tr. 39-40)

Defendant's Exhibit No. 2, a certified copy of the death certificate of Sharon Sweeney, was marked for identification and received into evidence, over objection of the Government, and was read to the jury. (Tr. 50)

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor; and to have the Assistance of Counsel for his defence.

Rule 48(b) of the Federal Rules of Criminal Procedure provides:

> If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

Rule 5(c) of the Federal Rules of Criminal Procedure provides:

> The defendant shall not be called upon to plead. If the defendant waives preliminary examination, the commissioner shall forthwith hold him to answer in the district court. If the defendant does not waive examination, the commissioner shall hear the evidence within a reasonable time. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. If from the evidence it appears to the commissioner that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the commissioner shall forthwith hold him to answer in the district court; otherwise the commissioner shall discharge him. The commissioner shall admit the defendant to bail as provided in these rules. After concluding the proceeding the commissioner shall transmit forthwith to the clerk of the district court all papers in the proceeding and any bail taken by him.

Title 22 of the District of Columbia Code, section 3204, provides:

> No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house of place of business or on other land possessed by him, a pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in section 22-3215, unless the violation occurs after he has been convicted in the District of Columbia of a violation of this section or of a felony, either in the District of Columbia or in another jurisdiction, in which case he shall be sentenced to imprisonment for not more than ten years.

Title 24 of the District of Columbia Code, section 301(a) provides:

> Whenever a person is arrested, indicted, charged by information, or is charged in the juvenile court of the District of Columbia, for or with an offense and, prior to the imposition of sentence or prior to the expiration of any period of probation, it shall appear to the court from the court's own observations, or from prima facie evidence submitted to the court, that the accused is of unsound mind or is mentally imcompetent so as to be unable to understand the proceedings against him or properly to assist in his own defense, the court may order the accused committed to the District of Columbia General Hospital or other mental hospital designated by the court, for such reasonable period as the court may determine for

> examination and observation and for care and treatment if such is necessary by the psychiatric staff of said hospital. If, after such examination and observation, the superintendent of the hospital, in the case of a mental hospital, or the chief psychiatrist of the District of Columbia General Hospital, in the case of District of Columbia General Hospital, shall report that in his opinion the accused is of unsound mind or mentally incompetent, such report shall be sufficient to authorize the court to commit by order the accused to a hospital for the mentally ill unless the accused or the Government objects, in which event, the court, after hearing without a jury, shall make a judicial determination of the competency of the accused to stand trial. If the court shall find the accused to be then of unsound mind or mentally incompetent to stand trial, the court shall order the accused confined to a hospital for the mentally ill.

STATEMENT OF POINTS

1. The delay in charging Epperson with the felony of carrying a dangerous weapon was unreasonable and unnecessary and resulted in prejudice to the presentation of his defense in violation of his rights under the Due Process Clause of the Fifth Amendment and Rule 48(b) of the Federal Rules of Criminal Procedure.

2. The delay in charging Epperson with the felony of carrying a dangerous weapon was unreasonable and resulted in prejudice to the presentation of his defense in violation of his rights under the Sixth Amendment.

3. The denial without a hearing of Epperson's motion for a pre-trial mental examination was an abuse of discretion and substantially impaired Epperson's rights.

SUMMARY OF ARGUMENT

ONE. Epperson was originally charged with the misdemeanor of carrying a dangerous weapon. After the death of his principal witness that charge was nolle prossed and Epperson was charged with the felony of carrying a dangerous weapon. At or about the time of the initial charge the Government knew that his prior convictions gave rise to the possibility of charging him with a felony. No reasons have been advanced by the Government for the delay in charging Appellant with a felony. Had Appellant been so charged originally, he would have had the benefit of a preliminary hearing pursuant to Rule 5(c) of the Federal Rules of Criminal Procedure and the testimony of his principal witness would have been preserved. The Government's delay in so charging Appellant is without justification and prejudiced Appellant's rights under the Due Process Clause of the Fifth Amendment and Rule 48(b) of the Federal Rules of Criminal Procedure.

TWO. Delay in itself is not prejudicial. If the Government makes a deliberate choice which, because of a later revocation results in prejudicial delay, such delay violates Appellant's rights to a speedy trial under the Sixth Amendment.

THREE. Appellant made a pro se motion for a pre-trial mental examination. That motion was denied without a hearing. Recidivism is sufficient grounds to order such an examination. The denial of that motion was an abuse of discretion and substantially impaired Epperson's rights.

ARGUMENT

ONE. THE DELAY IN CHARGING EPPERSON WITH THE FELONY OF CARRYING A DANGEROUS WEAPON WAS UNREASONABLE AND UNNECESSARY AND RESULTED IN PREJUDICE TO THE PRESENTATION OF HIS DEFENSE, IN VIOLATION OF HIS RIGHTS UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT AND RULE 48(b) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

Under both the "basic fairness" test of the Due Process Clause of the Fifth Amendment and Rule 48(b) of the Federal Rules of Criminal Procedure[1/] two factors must be present to constitute a violation

---

1/ Appellant recognizes that Rule 48(b) invokes the Court's supervisory power in supplementing protection of his rights under the Sixth Amendment. However, since the factors of consideration of a violation are the same, the discussion is treated here to avoid repetition.

of the rights protected under those provisions. The defendant must show:

> 1. That he has in fact been prejudiced by the delay; and
>
> 2. That there is no legitimate reason for the delay. 2/

The loss of a witness who has become unavailable as a result of the delay may constitute prejudice. 3/ It is true that in the instant case there was one other possible witness who may have been able to render some assistance to Epperson in his defense, but as the Court stated in United States v. Parrott:

> It may well be that other satisfactory witnesses are available, but it is not the Government's prerogative to select which witnesses the defense can or cannot call, and when the Government delay produces a result that amounts to such a selection, the Court will consider the defendants to have been prejudiced. 4/

2/ See, e.g., Powell v. United States, 122 U.S. App. D.C. ___, 352 F.2d 705 (D.C. Cir. 1965); Ross v. United States, 121 U.S. App. D.C. 233, 349 F.2d 210 (D.C. Cir. 1965).

3/ See, e.g., Jackson v. United States, 121 U.S. App. D.C. 160, 351 F.2d 821 (D.C. Cir. 1965) (dictum); United States v. Parrott, 248 F. Supp. 196 (D.D.C. 1965); cf. Hanrahan v. United States, 121 U.S. App. D.C. 134, 348 F.2d 363 (D.C. Cir. 1965).

4/ 248 F. Supp. 196, 205. The defendants had proffered a list of prospective witnesses who were unavailable at the time of trial. The defendants in fact had other witnesses available. The Court stated: "Realizing that all of the proffered testimony might not reasonably be expected of this witness, the Court, nevertheless, finds that his unavailability has resulted in prejudice." Ibid.

Appellant was arrested for a violation of Title 22 of the District of Columbia Code, section 3204. He sought to present the defense that another person had placed the pistol in his belt while he was asleep from sedation and that he was unaware that he was in possession of the pistol. As illustrated at the trial, [5] the nature of the defense sought to be advanced is one which Appellant could not possibly offer an experience or event of which he was personally aware; it was such that he had to rely on the testimony of the person participating in the experience or event which in fact constituted his defense. [6] The other party, Miss Sharon Sweeney, was present with Appellant at both court appearances prior to the initial trial date and would have testified in Appellant's behalf.. She died before Appellant came to trial. [7]

5/ Tr. 37:

"Q. Did you see her do it?

A. No.

Q. Did you feel her do it?

A. No.

Q. You don't know that she did it then?

A. I couldn't say, but --

Q. Can you answer that yes or no?

A. No, I can't answer that yes or no."

6/ Tr. 27.

7/ Tr. 36.

This is not simply corroborative evidence that is now unavailable. Epperson was faced at trial with the unenviable position of not being able to testify directly as to his defense, and of not being able to present any defense unless he took the stand himself. The situation in this respect in analogous to that of Jackson.[8] In light of his prior convictions his indirect testimony would seem to stand little chance of success.[9]

The rationale of this Court's decision in Ross v. United States is apposite. The Court there held that a delay between the offense and arrest violated the Due Process Clause of the Fifth Amendment, or defendant's rights under Rule 48(b), when the defendant was unable to present his defense because of the intervening delay.[10]

8/ 121 U.S. App. D.C. 160, 351 F.2d 821 (D.C. Cir. 1965).

9/ See Note, Constitutional Limits on Pre-Arrest Delays, 51 IOWA L. REV. 670 (1966), in which the author points out that such a situation compounds the prejudicial effect of witness-unavailability due to delay.

10/ 121 U.S. App. D.C. 233, 349 F.2d 210 (D.C. Cir. 1965). Defendant's witness was unable to recall the crucial events in question because of the lapse of time. See Note, The United States Court of Appeals for the District of Columbia Circuit: 1964-1965 Term, 54 GEO. L.J. 184, 214-15 (1965).

While recognizing the factual distinctions present in that case the rationale is controlling. The Court relied heavily upon analogous circumstances: there was uncorroborated testimony of a single policeman, the defendant denied the crime and the nature of the disability, a failure of memory, made a direct showing of prejudice impossible. It is submitted that the critical element of the Ross case and subsequent decisions 11/ is that the defendant was unable to present an adequate defense because of a Government delay during which a witness became unavailable. The result is precisely the same in the instant case. Moreover, in Ross and its progeny there was a very justifiable reason for the delay, that of effective enforcement of the narcotics laws; in the instant case there is no such justification.

11/ Worthy v. United States, 122 U.S. App. D.C. ___, 352 F.2d 718 (D.C. Cir. 1965); Powell v. United States, 122 U.S. App. D.C. ___, 352 F.2d 705 (D.C. Cir. 1965); Jackson v. United States, 121 U.S. App. D.C. 160, 351 F.2d 821 (D.C. Cir. 1965); Cannady v. United States, 122 U.S. App. D.C. ___, 351 F.2d 817 (D.C. Cir. 1965); Mackey v. United States, 122 U.S. App. D.C. ___, 351 F.2d 794 (D.C. Cir. 1965); Bey v. United States, 121 U.S. App. D.C. 337, 350 F.2d 467 (D.C. Cir. 1965). In most of the cases the defendant did not make a showing of prejudice resulting from the delay.

The prejudice need not be "proved beyond a reasonable doubt, or even by a preponderance of the evidence."[12/] It is sufficient if a "plausible claim" is advanced.[13/] Certainly Appellant has shown more than a "plausible claim."

TWO. THE DELAY IN CHARGING EPPERSON WITH THE FELONY OF CARRYING A DANGEROUS WEAPON WAS UNREASONABLE AND RESULTED IN PREJUDICE TO THE PRESENTATION OF HIS DEFENSE IN VIOLATION OF HIS RIGHTS UNDER THE SIXTH AMENDMENT.

Under the Sixth Amendment four factors are to be considered in determining a violation of the right to a speedy trial. The factors are:

1. The length of the delay
2. The cause of the delay
3. The prejudice caused by the delay
4. Whether there was a waiver by the defendant.[14/]

"Delay," the passage of time, does not in and of itself cause prejudice. Prejudice is a consequence of such passage of time, most often in terms of human behavior, such as loss of memory or the death or unavailability of a witness. It has been recognized that "even

---

12/ Jackson v. United States, 121 U.S. App. D.C. at 162, 351 F.2d at 823.

13/ Ross v. United States, 121 U.S. App. D.C. at 126, 349 F.2d at 215.

14/ See, e.g., United States v. Simmons, 338 F.2d 804 (2d Cir. 1964), cert. denied, 380 U.S. 983 (1965); United States ex rel. Von Cseh v. Ray, 313 F.2d 620 (2d Cir. 1963).

a short delay might constitute a violation of the defendant's constitutional right [to a speedy trial] where the defendant is held without bail, and there is no reason for the delay." 15/ The legally significant result of delay, prejudice, may or may not be capable of a precise determination as to the time of the occurrence of prejudice. The time will depend upon the particular nature of the prejudice involved. Death of a witness is certain; loss of memory is not. The propriety or impropriety of the actions of the parties involved must therefore become material only if such delay has resulted in prejudice, 16/ and should then be considered only with relation to the period preceding the detrimental event. There is most often no "fault" in the occurrence of the event that is termed prejudicial; the responsibility of assuming the consequences of the delay is attributable the the causal agent thereof. It is only at this time that justification for the delay becomes material. If there is valid justification for the delay its consequences will be counterbalanced by the societal considerations which constitute the justification therefore. If the delay is not justifiable, then the societal concern for the

---

15/ 313 F.2d at 623.

16/ Cf., Pollard v. United States, 352 U.S. 354 (1957); United States v. Simmons, 338 F.2d 804 (2d Cir. 1964), cert. denied, 380 U.S. 983 (1965).

just resolution of the competing interests demands that the cause of the delay assume its consequences.

The circumstances of the instant case need not be repeated. The length of the delay is not of itself offensive; the result of the delay is very offensive. The prejudice has been demonstrated. Appellant does not contend that the Government is precluded from nolle prossing one charge and later re-charging the offense, or even from charging a greater offense arising from the same event.[17/] Nor does he contend that any unfortunate loss of witnesses resulting from any delay is offensive. He contends only that the later, more serious charge, of the same offense, under circumstances of the Government's prior knowledge as are present in the instant case, was oppressive, without justification and severely prejudiced him.

A delay need not be willful or malicious to be oppressive. Indeed, in the Parrott case the Court

---

17/ Smith v. District of Columbia, D.C. App. No. 3815-3824 (June 1, 1966) is a recent case which considers the right of the United States Attorney to nolle pross a case in the Court of General Sessions and to subsequently re-charge. While terming the right "almost absolute," the Court stated that the right may not be excercised if it is "caprious" or "oppressively or arbitrarily used." No such conduct was found when the subsequent charge was less serious than the former, and "no prejudice to the rights of appellants to [a] fair and speedy dispositions of the charges against them resulted."

held that a negligent delay of twenty-two months which in fact prejudiced the defendants by the loss of prospective witnesses violated the defendant's rights. [18] While the Court reached its conclusion through Rule 48(b), it stated that:

> It is not necessary to reach the . . . issues under the Fifth Amendment, or the Sixth Amendment speedy trial issues. Were it necessary to reach these constitutional questions, the result would be the same for these defendants have been denied substantial constitutional rights guaranteed under these Amendments. [19]

This Court has stated in Marshall v. United States [20] that "though the delay was not purposeful in any meaningful sense, much of it was arbitrary, and in the aggregate it was oppressive and vexatious." In the instant case the Government was the cause of the delay in which the prejudice ensued by its "deliberate choice" [21] of charges; the prejudice to Appellant and the subsequent delay was a direct result of that choice.

18/ 248 F.Supp. 196 (D.D.C. 1965); cf., Hanrahan v. United States, 121 U.S. App. D.C. 134, 139, 348 F.2d 363, 368 (D.C. Cir. 1965); Ross v. United States, 121 U.S. App. D.C. 233, 238, 349 F.2d 210, 215.

19/ 248 F.Supp. at 206.

20/ ___ U.S. App. D.C. ___, ___, 337 F.2d 119, 122 (D.C. Cir. 1964).

21/ Petition of Provoo, 17 F.R.D. 183, 202 (D.Md.), aff'd per curiam, 350 U.S. 857 (1955).

Prejudice may be found in the Government exercising "a deliberate choice . . . which caused as much oppressive delay and damage to the defendant as it would have caused if it had been made in bad faith." 22/ The delay in charging Appellant with the felony not only renders the protections of Rule 5(c) meaningless but is offensive to the spirit of the Sixth Amendment. 23/ Further, had Appellant been brought to trial promptly after indictment, he would have had the benefit of the supplemental testimony of his only possible remaining witness.

Appellant could hardly be said to have acquiesced freely and intelligently in the prejudicial delay in light of the circumstances.

There is no justification for reneging on such choice, in light of the circumstances. The gravity of the offense, and therefore the necessity for protecting society, is not great; the offense is not malum in se.

Appellant therefore contends that his rights under the Sixth Amendment have been violated.

22/ Id. at 202, quoted in Parrott, 248 F.Supp. at 203. Cf., United States v. Simmons, 338 F.2d 804, 807 (2d Cir. 1964), cert. denied, 380 U.S. 983 (1965).

23/ See, e.g., Hanrahan v. United States, 121 U.S. App. D.C. 134, 138, 348 F.2d 363, 366-67 (D.C. Cir. 1965).

THREE. THE DENIAL WITHOUT A HEARING OF EPPERSON'S MOTION FOR A PRE-TRIAL MENTAL EXAMINATION WAS AN ABUSE OF DISCRETION AND SUBSTANTIALLY IMPAIRED EPPERSON'S RIGHTS.

Pursuant to Title 24 of the District of Columbia Code, section 301 (a), Appellant made a pro se motion for a pre-trial mental examination; the motion was denied, without a hearing, on the same day that it was filed. No reasons were advanced for such denial. The motion stated that Appellant was fifty-five years of age, had a long history of emotional imbalance and had no recollection of the offense with which he was charged.

In Cannady v. United States,[24/] this Court held that "an accused's uncontroverted allegations of facts suggestive of mental illness must be accepted as true for the purpose of a pre-trial motion for a mental exam."[25/] (Emphasis added.) The matters set forth in Appellant's motion, when considered in conjunction with his long criminal record evidencing recidivism, were sufficient to compel the granting of the motion.[26/] Indeed, recidivism alone is sufficient to compel granting such a motion.[27/]

24/ 122 U.S. App. D.C. ___, 351 F.2d 817 (D.C. Cir. 1965).

25/ Id. at ___, 351 F.2d at 819.

26/ Mitchell v. United States, 114 U.S. App. D.C. 353, 316 F.2d 354 (D.C. Cir. 1963).

27/ See, Leach v. United States, 115 U.S. App; D.C.351, 337 F.2d 945 (D.C. Cir. 1964)

Such denial was an abuse of discretion and substantially prejudiced Appellant's rights in that there was no determination as to either his mental capacity to commit the offense with which he was charged, or of his competency to stand trial.

CONCLUSION

For each of the reasons set forth in each of the arguments, the conviction of Epperson should be reversed.

Respectfully submitted,

BAKER, McKENZIE & HIGHTOWER

By _____

J. P. JANETATOS

WALTER A. SLOWINSKI
Counsel for Appellant
(Appointed by this Court)

815 Connecticut Avenue, N. W.
Washington, D. C. 20006
(298-8290)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief has been delivered by hand to the Office of the United States Attorney this 9th day of August, 1966.

_____

J. P. JANETATOS

Statement Pursuant to Rule 41(j)

Because of the interrelationship of Arguments ONE, TWO and THREE, Appellant desires the Court to read the following portions of the reporter's transcript with respect to all three points:

Tr. 35-36, testimony of Raymond W. Epperson.

Tr. 36-37, testimony of Raymond W. Epperson.

Tr. 50, introduction of the death certificate of Sharon Sweeney

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,914

RAYMOND W. EPPERSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
Assistant United States Attorney.

Of Counsel:

HUGH M. DURHAM
Attorney, Department of Justice

Cr. No. 592-64

QUESTIONS PRESENTED

1. Whether the government's election to nolle prosse the charge in the Court of General Sessions without objection and in deference to Grand Jury action substantially prejudiced the rights of appellant under the Due Process Clause of the Fifth Amendment or Rule 48(b), F.R.Crim.P.

2. Whether under the facts of this case appellant's Sixth Amendment right to a speedy trial was violated.

3. Whether the denial of a request for a pre-trial mental examination was an abuse of discretion which substantially prejudiced the rights of appellant.

INDEX

TABLE OF CASES

*Cases principally relied on.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,914

RAYMOND W. EPPERSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

The appellant, Raymond W. Epperson, was convicted by a jury on November 29, 1965 on an indictment charging him with carrying a dangerous weapon. He was sentenced to imprisonment for fifteen to forty-five months and he appeals.

During the early morning hours of April 24, 1964 a detective sergeant of the Metropolitan Police Department arrested the appellant when he noticed him standing in front of 825 14th Street, Northwest, Washington, D.C. with the butt of a pistol sticking out of his shirt. The pistol contained four live rounds of ammunition and one spent shell.

Appellant on the same date was brought before the District of Columbia Court of General Sessions on the charge of carrying a dangerous weapon, requested a continuance, and was released on $500 bond. The surety surrendered the defendant on April 29, 1964, and cancelled the bond. On May 19, 1964 appellant's request for a jury trial was granted and trial was set for June 17, 1964. The charge before the District of Columbia Court of General Sessions was nolle prossed on June 17, 1964 prior to the commencement of the trial. Appellant was charged with a felony of carrying a dangerous weapon, waived hearing on the felony charge without objection to the change to a felony, and was committed to jail in default of recognizance of $2000. The matter was presented to the Grand Jury on June 23, 1964. On June 29, 1964 the grand jury returned an indictment charging the appellant with carrying a dangerous weapon without a license in violation of Title 22, District of Columbia Code, Section 3204. He was released on bail one month later.

Epperson was arraigned on July 2, 1964, pleaded not guilty, and the trial was scheduled for August 13, 1964. On August 7, 1964 at the request of defense counsel the case was continued to the week of October 5, 1964. On September 29, 1964 and again on October 15, 1964 continuances were obtained by defense counsel. In the meantime, appellant, who had been released on bail on August 29, 1964, was apprehended by Baltimore police on October 2, 1964 on an unrelated charge. He was ultimately returned by Maryland authorities to custody in the District of Columbia on July 2, 1965.

Appellant made a motion to dismiss the indictment which was heard, argued and denied on October 8, 1965. Grounds for this motion were, *inter alia*, that his rights were substantially prejudiced by the failure of the government to initially treat the offense as a felony.

Epperson then made a motion to suppress evidence on the allegation that the arrest was unlawful. This was denied. Then on November 19, 1965 he moved for a pretrial mental examination. This motion was heard on No-

vember 22, 1965 and denied. On November 29, 1965 the appellant was tried before a jury and found guilty as charged.

Trial

The Government's presentation at the trial was very simple and uncomplicated. Detective Sergeant Teddy Thanos, the arresting officer, testified that he arrested the appellant when he observed him standing in front of a club-restaurant at 825 14th Street, Northwest, with the butt of a gun sticking out of his shirt. (Tr. 4, 5). Detective Thanos asked Epperson where he obtained the gun and his reason for carrying it and received no answer. He stated that the appellant had the odor of alcohol on his breath, but was not drunk and gave no indication of being sick. (Tr. 7). The Government concluded its case by introducing a stipulation between counsel that if Howard D. Covell, Deputy Chief of Police, District of Columbia, were called, he would testify that the police records showed that appellant at the time of his arrest had no license to carry a pistol. (Tr. 12, 13).

Three witnesses were called for the defense. First an official of Prince George's General Hospital testified that the appellant was a patient at that hospital from March 24, 1964, to April 14, 1964. One of the resident doctors then testified that Epperson was treated for a heart attack (Tr. 19) and upon discharge was given several medications, including phenobarbital. (Tr. 22). He was given 28 tablets with instructions to take four per day. (Tr. 23). Finally the appellant testified that he went to the Red Slipper Club about 11 p.m. on the evening of April 23, 1964, at the request of Sharon Sweeney, one of the entertainers. Upon entering the club he went to the bartender, asked for Miss Sweeney and was told she was in her dressing room. (Tr. 29). He stated he had one drink and ordered a second one. Also, Epperson testified that after arriving at the club, he took 10 or 12 phenobarbital pills for chest pains. He stated that the next thing he knew he was being arrested (Tr. 32). He denied

being aware that he had had a gun until he was told about it at four or five o'clock the next morning (Tr. 34). In further testimony Epperson stated that Sharon Sweeney had "put it [the gun] there" (Tr. 35). A death certificate was later introduced showing that Miss Sweeney died on June 8, 1964 (Tr. 50, 51). On cross-examination Epperson admitted to prior felony convictions (Tr. 39-41).

The physician from the hospital, on recall, testified that a person who took 10 to 12 phenobarbital tablets would become "quite drowsy" (Tr. 42) and that whiskey would speed and intensify the sedative effect (Tr. 43). On cross-examination the doctor indicated that such a quantity of phenobarbital would make some people quite drowsy, but not cause them to lose consciousness, and that this condition would last about six hours or so (Tr. 48).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Article V, Constitution of the United States, provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Article VI, Constitution of the United States, provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to

have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

Rule 5(c), Federal Rules of Criminal Procedure, provides:

> *Preliminary Examination.* The defendant shall not be called upon to plead. If the defendant waives preliminary examination, the commissioner shall forthwith hold him to answer in the district court. If the defendant does not waive examination, the commissioner shall hear the evidence within a reasonable time. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. If from the evidence it appears to the commissioner that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the commissioner shall forthwith hold him to answer in the district court; otherwise the commissioner shall discharge him. The commissioner shall admit the defendant to bail as provided in these rules. After concluding the proceeding the commissioner shall transmit forthwith to the clerk of the district court all papers in the proceeding and any bail taken by him.

Rule 48(b), Federal Rules of Criminal Procedure, provides:

> *By Court.* If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

Title 22, District of Columbia Code, Section 3204, provides:

> No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a pistol, without

a license therefor issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in section 22-3215, unless the violation occurs after he has been convicted in the District of Columbia of a violation of this section or of a felony, either in the District of Columbia or in another jurisdiction, in which case he shall be sentenced to imprisonment for not more than ten years.

Title 23, District of Columbia Code, Section 111, provides:

> If a material witness for the defendant resides beyond the District of Columbia, or is sick or infirm, or about to leave the District, the defendant may apply in writing to the court for a commission to examine such witness upon interrogatories thereto annexed when the deposition is to be taken beyond the District of Columbia, and orally in other cases, and the court may grant the same and pass an order stating for what length of time notice shall be given to the United States attorney before said witness shall be examined. At or before the time fixed in said notice, when the examination is upon written interrogatories, the United States attorney may file cross-interrogatories, but if he fail to do so the clerk shall file the following:
>
> First. Are all your statements in the foregoing answers made from your own personal knowledge? And if not, show what is stated upon information and give its source.
>
> Second. State everything you know in addition to what is stated in your above answers concerning this case favorable to either the United States or the defendant.
>
> For good cause shown the court may order in any case that the examination be conducted orally.

Title 24, District of Columbia Code, Section 301(a), provides:

> Whenever a person is arrested, indicted, charged by information, or is charged in the juvenile court

of the District of Columbia, for or with an offense and, prior to the imposition of sentence or prior to the expiration of any period of probation, it shall appear to the court from the court's own observations or from prima facie evidence submitted to the court, that the accused is of unsound mind or is mentally incompetent so as to be unable to understand the proceedings against him or properly to assist in his own defense, the court may order the accused committed to the District of Columbia General Hospital or other mental hospital designated by the court, for such reasonable period as the court may determine for examination and observation and for care and treatment if such is necessary by the psychiatric staff of said hospital. If, after such examination and observation, the superintendent of the hospital, in the case of a mental hospital, or the chief psychiatrist of the District of Columbia General Hospital, in the case of District of Columbia General Hospital, shall report that in his opinion the accused is of unsound mind or mentally incompetent, such report shall be sufficient to authorize the court to commit by order the accused to a hospital for the mentally ill unless the accused or the Government objects, in which event, the court, after hearing without a jury, shall make a judicial determination of the competency of the accused to stand trial. If the court shall find the accused to be then of unsound mind or mentally incompetent to stand trial, the court shall order the accused confined to a hospital for the mentally ill.

SUMMARY OF ARGUMENT

I

There was no denial of fundamental fairness in deferring to the felony charge after the original misdemeanor charge was filed in the Court of General Sessions. There was no prompt objection to this charge. Accordingly the felony charge was not wrongfully returned. Moreover, no plausible claim of prejudice has been advanced by the appellant.

II

Appellant complains principally about the lapse of time between the commission of the offense and the charging of the felony. The rights to a speedy trial under the Sixth Amendment refer to delays in bringing an accused to trial rather than delays in bringing the charge. Further, even if applicable, rights to a speedy trial must be asserted in some manner by the defendant or are deemed waived. In this case, appellant did not seek a more speedy trial and in fact waived such rights in oral argument on a motion to dismiss the indictment. Therefore, no rights of appellant under the Sixth Amendment were prejudiced.

III

Appellant's motion for a pre-trial mental examination was heard in open court with appellant's counsel present. The court denied the motion on the ground that no sufficient predicate has been made. The motion did not make the prima facie showing that is necessary and no additional support was offered by appellant's counsel at the hearing. The denial of the motion, under the circumstances, was not an abuse of discretion and Epperson's rights were not substantially impaired.

ARGUMENT

I. The two-month delay in charging Epperson with the felony after the prompt misdemeanor charge of carrying a dangerous weapon did not violate his rights under the due process clause of the Fifth Amendment or Rule 48(b) of the Federal Rules of Criminal Procedure.

This Court has indicated that due process may be denied when a formal charge is delayed for an unreasonably oppressive and unjustifiable time after the offense to the prejudice of the accused. *Nickens* v. *United States*, 116 U.S. App. D.C. 338, 340 n.2, 323 F.2d 808, 810 n.2 (1963), *cert. denied*, 379 U.S. 905 (1964). To come with-

in the above rule,[1] this Court has stated that an accused must show two things to establish basic "unfairness"—no legitimate reason for the delay, and prejudice by the delay. *Powell* v. *United States*, 122 U.S. App. D.C. 229, 352 F.2d 705 (1965). The burden of establishing a plausible claim of prejudice is on the appellant. *Jackson* v. *United States*, 122 U.S. App. D.C. 124, 351 F.2d 821 (1965).

To establish prejudices in this case the appellant contends that, had he been charged originally with a felony, he would have had the benefit of a preliminary hearing pursuant to Rule 5(c), F. R. Crim. P. and the testimony of his principal witness would have been preserved (Brief for Appellant, p. 17). The argument is bottomed upon the use by appellant of Miss Sweeney as a defense witness at the preliminary hearing.

The purpose of a preliminary hearing is to determine whether or not there is probable cause to believe that the defendant has committed an offense, *United States* v. *Lucas*, 91 U.S. App. D.C. 278, 201 F.2d 182 (1952). While the competency and sufficiency of the evidence necessary to establish probable cause depends on the circumstances of each case, *Washington* v. *Clemmer*, 119 U.S. App. D.C. 216, 339 F.2d 715 (1964), it appears clear that the testimony of the arresting officer, which was never disputed by the appellant, would have been ample justification for holding him for the felony charge. There would have been no basis to discharge appellant at a preliminary hearing even if he had produced a witness who would have testified that she placed the gun in his shirt while he was unaware of it. Probable cause does not require an ultimate determination of guilt by the magistrate.

---

[1] The analysis contained herein applies to both the due process and Rule 48(b) allegation of appellant. It seems clear that the concepts and application of principles are the same in this area. See, *Powell* v. *United States*, 122 U.S. App. D.C. 229, 352 F.2d 705 (1965).

The appellant would have had little to gain by putting his defense before the commissioner unless he could have foreseen the need to preserve the testimony of his witness. Obviously the death of Miss Sweeney was not anticipated. If her death had been forseen, her testimony could have been preserved for the pending trial in the Court of General Sessions by taking her deposition pursuant to Title 23, District of Columbia Code, § 111. Thus, at best, appellant's position is so highly speculative as to leave no reasonable basis for an inference of prejudice to his case. He, in effect, argues that the relatively short delay became critical because of the unforseeable death of his "witness" who would, ostensibly, say she gave him a gun, for no apparent reason, while he was so semi-unconscious from drugs and alcohol that he did not know of it.

As to the question of delay, it is clear that the action of the prosecutor in dropping the charge was not unreasonably oppressive in the context of this case, after presentation of the matter to the Grand Jury on June 23, 1964.[2] The prosecution had the authority to nolle prosse the charge in the Court of General Sessions[3] on the basis of the expected Grand Jury action. The indictment prospect could hardly be ignored at the price of doube jeopardy. Sixty-six days elapsed between the date of the offense and the date the charge was formally increased from a misdemeanor to a felony by the Grand Jury. There is no indication that this action by the Grand Jury was prompted by malice, bad faith or was otherwise vindictive in origin.

Appellant relies in his brief on *Ross* v. *United States*, 121 U.S. App. D.C. 233, 349 F.2d 210 (1965) and *Parrott* v. *United States*, 248 F.Supp. 196 (D.D.C. 1965). In the *Ross* case the time interval between the offense and the formal charge was seven months and in the *Parrott* case at least twenty-two months. Moreover, Ross involved an informant-narcotics case. No case has been cited in

---

[2] The official records so reflect.

[3] *Smith* v. *District of Columbia*, 219 A.2d 842 (D.C.C.A. 1966).

which the short period here involved was considered oppressive. Furthermore, in the *Ross* case the accused was not aware during the period of delay that criminal proceedings against him were forthcoming.

It cannot be said that the facts in this case indicate fundamental unfairness to the appellant. It cannot be said that deference to the Grand Jury of the forthcoming indictment, by the dropping of the lesser charge, was so fundamentally unfair as to vitiate the former. Appellant was arrested at the time of the offense on the charge of carrying a dangerous weapon, the basic offense for which he was tried and convicted. He was, therefore, apprised from the first of the accusation against him. He did not object when the lesser charge was dropped and the greater filed by complaint. All during the period from the time of his arrest to the death of Miss Sweeney (44 days) he could have preserved her testimony pursuant to Title 23, District of Columbia Code, § 111. Even if he had gone to trial in the Court of General Sessions on June 17, 1964, as originally scheduled, it would have been without Miss Sweeney's testimony. Accordingly, the proceedings under the indictment were proper.

II. The delay in charging Epperson with the felony of carrying a dangerous weapon did not prejudice the presentation of his defense in violation of his rights under the Sixth Amendment.

(Hearing Tr. 11, 12)

The Sixth Amendment provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ." The trial in the instant case took place approximately nineteen months after the occurrence of the offense, but the record clearly shows that only a small portion of this delay was not appellant's fault. The case was first scheduled for trial in the District Court on August 13, 1964, approximately two and one-half months after the commission of the offense. It was finally tried on November 29, 1965. None of the delay between Au-

gust 13, 1964 and November 29, 1965 can be attributed to the prosecution. During this time the appellant obtained numerous continuances and was also incarcerated in Maryland.

Under this heading, appellant complains principally about the lapse of time between the commission of the offense and the charging of the felony. This Court has held that a claim relating to delay between the date of the offense and the commencement of criminal prosecution is not covered by the Sixth Amendment. *Nickens* v. *United States*, 116 U.S. App. D.C. 338, 323 F.2d 808 (1963), *cert. denied*, 379 U.S. 905; *cf. Parrott* v. *United States*, 248 F. Supp. 196 (D.D.C. 1965). Further, even if applicable, rights to a speedy trial under the Sixth Amendment must be asserted in some manner by the defendant or are deemed waived. *Mack* v. *United States*, 326 F.2d 481 (8th Cir. 1964), *cert. denied*, 377 U.S. 947. In the instant case there is nothing in the record to indicate that appellant made any effort to receive a more speedy trial.

Further, the following colloquy took place during the argument of appellant's motion to dismiss the indictment:

> THE COURT: Are you familiar with these facts that have been related by Mr. Dibble?
>
> MR. ABELES [Counsel for defendant]: Yes, Your Honor, I am generally, and I did not wish to imply that any matter of continuance or delay in trial was a part of this motion. The defendant has indeed requested that his trial be put off until all matters have been disposed of and the record—he has waived his right to a speedy trial, as would indicate in the record. . . ." (Hearing Tr. pp. 11, 12)

Therefore, appellant's rights under the Sixth Amendment were not violated.

III. The denial of appellant's motion for pre-trial mental examination was not an abuse of discretion.

Nearly sixteen months after the return of the indictment and after numerous and sundry other motions, the appellant filed a motion requesting a mental examination. A hearing in open court with appellant's counsel present was held by Chief Judge McGuire on November 22, 1965 and the motion was denied.

Appellant's motion, which was *per se* and adopted by his counsel, stated that appellant was fifty-five years of age, had a history of emotional imbalance and had no recollection of the offense with which he was charged. At the hearing no additional support for the motion was offered by appellant's counsel. The appellant himself was not at the hearing, but the record does not indicate a request by either him or his counsel for his personal attendance. In any event, the right of an accused to be present in court throughout his trial does not embrace a right to be present at the argument of motions prior to trial or subsequent to verdict. *United States* v. *Lynch*, 132 F.2d 111 (3rd Cir. 1943), *cert. denied*, 318 U.S. 777.

The court is not required to order a pre-trial mental examination of an accused merely because he requests such examination. Under Section 24-301(a) of the D. C. Code, "the court may order the accused committed" for examination whenever "it shall appear to the court from the court's own observations, or from *prima facie* evidence submitted to the court, that the accused is of unsound mind or is mentally incompetent [to stand trial]."

Failure to make the *prima facie* showing of mental incapacity is adequate grounds for denial of a request for a mental examination. *Wheeler* v. *United States*, 82 U.S. App. D.C. 363, 165 F.2d 225 (1948), *cert. denied*, 333 U.S. 829 (1948). The mere allegation of "a long history of emotional imbalance" is not sufficient to establish a *prima facie* showing and the belated allegation that appellant had no recollection of the offense does little to bolster his case. While recidivism is a factor to be considered, no case has been found where it required a *pre-trial* mental

examination. Whether appellant could have insisted upon a post-trial, but pre-sentencing mental examination based upon the rationale of the Leach case, *Leach* v. *United States*, 115 U.S. App. D.C. 351, 334 F.2d 945 (1964) is not presented here.

The three cases which appellant cites in support of his position are all clearly distinguishable on their facts. In *Cannady* v. *United States*, 122 U.S. App. D.C. 120, 351 F.2d 817 (1965), the motion alleged detailed and comprehensive facts indicative of mental disease or defect. The Court stated:

> "Not only is an assertion of physiological drug addiction clearly implicit from both the affidavit and appellant's previous narcotic convictions but the affidavit explicitly relates both etiological and symptomatic factors that be indicative of a severe neurosis or psychosis which could have produced the narcotics offenses in this case." Id. at 819.

Likewise, in *Mitchell* v. *United States*, 114 U.S. App. D.C. 353, 316 F.2d 354 (1963), the motion for a mental examination and supporting material produced at the hearing contained substantial and detailed allegations and evidence tending to cast doubt on the defendant's mental condition. The third case, *Leach* v. *United States*, *supra*, involved the question of whether extreme recidivism and a pre-sentence report characterizing a prisoner as a "psychopatic offender" are adequate grounds for requiring a *post-trial*, but pre-sentence referral of the defendant for a mental examination. The question in the *Leach* case was whether under the facts of that case a mental examination was essential to provide necessary information for sentencing.

Chief Judge McGuire denied appellant's motion in the instant case on the ground that no sufficient predicate had been laid. On the meager and vague allegations presented by the motion in this case and the lack of additional support at the hearing, the court did not abuse its discretion

by refusing to grant the motion for a pre-trial mental examination.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
Assistant United States Attorney.

Of Counsel:

HUGH M. DURHAM
Attorney, Department of Justice

☆ U. S. GOVERNMENT PRINTING OFFICE: 1966 233245 268

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,914

Raymond W. Epperson,

Appellant

v.

The United States of America,

Appellee

PETITION FOR REHEARING EN BANC

Pursuant to Rule 26 of the Rules of the United States Court of Appeals for the District of Columbia Circuit, and 28 U.S.C. §46(c), Petitioner respectfully requests a reargument and a rehearing en banc in the above-captioned case.

Petitioner was convicted by a jury on a charge of carrying a dangerous weapon in violation of 22 D.C. Code §3204. On December 17, 1965 he was sentenced in the United States District Court for the District of Columbia to imprisonment for fifteen to forty-five months. An appeal was granted and on November 8, 1966, Petitioner's cause was argued before a three judge panel of this Court.

In that appeal Petitioner argued principally that the delay in charging him with the felony of carrying a dangerous weapon was unjustified and prejudicial and further that the denial of his motion for a pre-trial mental examination was an abuse of discretion.

On January 5, 1967, a decision was rendered wherein the panel unanimously held that there was nothing objectionable either in the extent of or reason for the delay. The panel held further that there was no basis for reversal of the ruling denying his application for a pre-trial mental examination.

The panel predicated its decision upon a policy consideration that "the courts will not skimp in affording the prosecutor an opportunity to obtain and appraise the prior record of the accused in order to determine whether to seek a felony conviction." The panel apparently found as a fact that "it took time to obtain the so-called 'rap sheet' from the FBI showing appellant's felony record outside the District of Columbia."

Petitioner contends that the factual basis of the panel's opinion is not supported by the record. It is believed that the Government will not argue that any portion of the delay was due to time taken to obtain records. It is significant to note that the Government did not, in its brief, urge the point upon which the panel decided this case.

Petitioner respectfully requests that this Court consider en banc the issue of whether prosecutors shall have complete discretion in changing misdemeanor charges to felony charges without regard to any time limitations.

Because of the unlimited freedom given prosecutors by the panel's opinion and the fundamental importance of the issue to the progressive administration of the law, Petitioner respectfully submits that the matter is a proper subject for en banc consideration.

Respectfully submitted,

J. P. Janetatos
Attorney for Appellant
Appointed by this Court

Baker & McKenzie
815 Connecticut Ave., N. W.
Washington, D. C.

CERTIFICATION

I hereby certify that the foregoing Petition for Rehearing En Banc is presented in good faith and not for delay.

J. P. Janetatos

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief has been delivered by hand to the Office of the United States Attorney this 17th day of January, 1967.

J. P. Janetatos